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No. 00-1770

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Petitioner,

V.

PEARLIE RUCKER, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*, HOUSING AND DEVELOPMENT LAW INSTITUTE AND NATIONAL ASSOCIATION OF HOUSING AND REDEVELOPMENT OFFICIALS, TOGETHER WITH BRIEF OF *AMICI CURIAE*, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI BY THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, TOGETHER WITH BRIEF OF *AMICI CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF
OF *AMICI CURIAE*

Housing and Development Law Institute, a District of Columbia not-for-profit corporation, (HDLI) and the National Association of Housing and Redevelopment Officials, a

District of Columbia not-for-profit corporation, (NAHRO) respectfully move this Court for leave to file the attached Brief of *Amici Curiae* in support of the Petition for Certiorari of the Delaware County Housing Authority.

Movants, HDLI and NAHRO, state as follows:

1. The purpose of this motion is to request leave of this Court to file a Brief of Amici Curiae in support of the Petition for Certiorari of the Delaware County Housing authority.

2. Movants, HDLI and NAHRO have a strong interest in the legal issues raised by this case.

Housing and Development Law Institute (HDLI) is a nationwide non-profit organization that acts as a legal resource to local public housing agencies and their legal counsel. Formed in 1984, HDLI has a present membership of approximately 300 local public housing agencies and law firms. In addition to publishing periodicals and other materials and conducting educational activities relating to the law of affordable housing, HDLI acts on its members' behalf with respect to legal aspects of state and federal housing policy.

The National Association of Housing and Redevelopment Officials (NAHRO) is a nationwide non-profit organization dedicated to facilitating local community development and the provision of decent, safe and sanitary housing to low-income families. Formed in 1933, as the National Association of Housing Officials (NAHO), NAHRO is the oldest and largest national membership organization devoted to affordable housing and community development. Its present membership numbers more than 8,400, including both agencies and public officials involved with affordable housing and community development throughout the Nation.

NAHRO's member agencies own or manage approximately 1,340,000 units of public housing (representing 99% of all public housing in the United States), and in addition, they administer rental assistance for more than 2,000,000 housing units. In all, NAHRO member agencies administer low-income housing in which approximately 7.6 million persons reside. NAHRO has played a key role in the development and interpretation of the nation's housing programs since their inception. With respect to matters of policy, NAHRO serves as the primary interface between the federal government and NAHRO's local housing agency members.

HDLI and NAHRO believe that the ruling in the court below, for which review by this Court is sought, is incorrect and that it unreasonably and improperly interferes with policies of the Federal Government as properly and lawfully articulated by the Petitioner, as well the lawful discretionary decisions of local housing authorities, addressing the problems of illegal drugs and crime in federally assisted public housing.

3. Written consent to the filing of a Brief of Amicus Curiae by HDLI and NAHRO in Support of the Petition for Writ of Certiorari has been given by:

Theodore B. Olson, Solicitor General of the United States, on behalf of the Federal Government

Susan T. Kumagai, Lafayette and Kumagai, LLP, San Francisco, California, counsel for the Oakland Housing Authority, petitioner in companion case No. 00-1784

John Murko, Oakland, California, Co-counsel for respondents has verbally declined to give written consent to the filing of a Brief of Amici Curiae by HDLI.and NAHRO.

Although the below named Co-counsel for such parties

and *amici* curiae in the court below have been requested in writing to provide written consent to the filing of a Brief of *Amicus Curiae* by HDLI and NAHRO, they have not responded:

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Matthew Siegel
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The following other counsel appearing below as interested parties in this case have been requested in writing to provide written consent to the filing of a Brief of Amicus Curiae by HDLI and NAHRO and have not responded:

Gideon Anders
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Toby Rothchild
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Legal Aid Foundation of Long Beach
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Alan J. Schlosser
ACLU Foundation of Northern California
San Francisco, California

Dara Lynn Schur
Western Center on Law & Poverty, Inc.
Oakland, California

4. Counsel for Amici Curiae is a member in good standing of the bar of this Court

HDLI and NAHRO therefore respectfully request, through the below named counsel, that this Court grant leave permitting HDLI and NAHRO to file the attached Brief of *Amici Curiae* pursuant to Rule 37.2(b) of the Rules of this Court.

Respectfully submitted,

June 22, 2001

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INTEREST OF THE AMICI CURIAE[1]

HDLI and NAHRO, the *amici curiae,* believe that ridding public housing developments of illegal drugs and crime is crucial to maintaining the viability of these developments. They also believe that the process and standards under which public housing agencies enforce their leases is critical to the successful management of public housing developments, crime reduction in those developments, and the physical and social well-being of the many law-abiding tenants of public housing. HDLI and NAHRO regard the decision of the court below as imposing unnecessary and improper legal impediments to removing criminal elements from public housing, thus diminishing the security and quality of life for all public housing residents.

SUMMARY OF ARGUMENT

A considerable number of State courts and three federal courts have considered the issues raised by this case, with conflicting results. Guidance from this Court is necessary to assure that the applicable federal law will be properly interpreted by the state and federal courts.

The incidence of crime and illegal drugs in public housing is a matter of great concern to the federal government. This concern is directly reflected in federal policies authorizing the removal from public housing of families whose members engage in drug-related or other serious criminal activity.

Section 6(*l*)(6) of the U.S. Housing Act of 1937 and the federal regulations and public housing lease provisions

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[1] In compliance with Rule 37.6 of this Court, *amici curiae,* HDLI and NAHRO state that the counsel named below, who serves as Executive Director and Counsel to HDLI, authored this brief in full, and that no party or entity other than the *amici curiae* made a monetary contribution to the preparation or submission of this brief. The *amici curiae* are described in the motion accompanying this brief.

implementing it clearly and unambiguously provide authority for the terminations of tenancy in this case, irrespective of whether the tenants knew of the criminal activities that constituted the grounds for termination or had control over the household members or guests engaging in such activities. Because the statute is unambiguous, resort to legislative history on the part of the lower court was improper. If, *arguendo*, the lower court properly considered legislative history, it erred in failing to consider relevant legislation subsequently enacted by Congress.

The court below erred in failing to defer to the interpretation of the statutory language by the Department of Housing and Urban Development (HUD). It also usurped the discretion properly residing with the housing authority under applicable federal law with respect to terminations of public housing tenancy.

Imposing responsibility on the head of household to ensure that the conduct of household members conforms to the requirements of the public housing lease is vital to the successful administration of the federal public housing program and is not unreasonable.

ARGUMENT

I. STATE AND FEDERAL COURTS ARE IN CONFLICT CONCERNING THE ISSUES RAISED BY THIS CASE. GUIDANCE FROM THIS COURT IS NECESSARY TO ASSURE THAT THE APPLICABLE FEDERAL LAW WILL BE PROPERLY INTERPRETED AND APPLIED.

The Oakland Housing Authority brought state court eviction actions against Respondents, Rucker, Lee, and Hill for drug-related criminal activity engaged in by household members outside their public housing units. Similar action was brought against Mr. Walker because of drug-related criminal activity in Mr. Walker's unit by a guest/caregiver.

The respective Respondents alleged in each case that they were unaware of the criminal activity, were thus innocent of wrongdoing, and should not be evicted.

The propriety of Respondents' assertion involves whether or not section 6(*l*)(6) of the United States Housing Act of 1937 (42 U.S.C. §1437d(*l*)(6)) and the regulations of the Department of Housing and Urban Development (HUD) implementing this language permit a public housing authority (PHA) to terminate the public housing tenancy of a so-called "innocent tenant." That is, do the statute and regulations authorize eviction of the entire household based on the criminal misconduct of an individual household member other than the head-of-household or of a guest, where the tenant head-of household asserts that he or she did not participate in the criminal activity and had neither knowledge of it nor the ability to prevent it.

Section 6(*l*)(6) was originally enacted (as section 6(*l*)(5)) in the Anti-Drug Abuse act of 1988. This provision required public housing leases to provide that:

> a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug-related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy. [emphasis supplied]

Id., §5101, 42 U.S.C. §1437d(*l*)(5). The operative language, the meaning of which is at issue in this case, is underlined.

This paragraph was amended and restated without substantive change to the operative language, by the Cranston-Gonzalez National Affordable Housing Act of 1990 (NAHA) (Pub. L. No. 101-625, § 504, 104 Stat. 4079, 4185 (1990)). The amended language requires public housing agencies to utilize leases that:

> (5) provide that any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, engaged in by a public housing tenant, any member of household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy. Id. [emphasis supplied]

The contrasting majority and dissenting opinions of the en banc Ninth Circuit in this case exemplify the sharp philosophic division of the courts nationwide concerning the proper interpretation of this statutory language, as applied to "innocent tenant" evictions.

The majority ruled that this language and the relevant HUD regulations[2] do not authorize the eviction of innocent tenants. It held that "if a tenant has taken reasonable steps to prevent criminal drug activity from occurring but for lack of knowledge or other reason could not realistically exercise control over the conduct of a household member or guest, §1437d(*l*)(6) does not authorize the eviction of such a tenant." 237 F3d. 1113, 1126. The court in essence fashioned a new regulation, which distinguishes between evictions for criminal activity occurring within the public housing unit and those where it occurs elsewhere. In the latter circumstance, the PHA may evict "when it can prove the tenant knew or should have known of the activity. In the former, a rebuttable presumption is created that a tenant controls what occurs in his or her unit, and PHAs may proceed with these evictions without initial proof of knowledge or control. Id. 1126-27

In reaching this result, the majority first determined

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2 HUD's regulations and regulatory preamble unequivocally authorize innocent tenant evictions. Pertinent portions of the regulations and preamble to HUD's Lease and Grievance rule are set forth in the Appendix (App. 1a-5a).

that the operative language (underlined above) in Housing Act §6(*l*)(6) does not itself speak to the question at issue - eviction of the "innocent tenant." This omission, it was said, rendered the language sufficiently ambiguous to permit resort to legislative history in an effort to ascertain congressional intent. Conceding that no such history can be found concerning the original enactment of this language in the 1988 Anti-Drug Abuse Act, the court nonetheless found indication of its meaning in Senate Report No. 101-316, relating to the subsequently enacted Cranston-Gonzalez National Affordable Housing Act of 1990 (NAHA). As noted, NAHA reenacted the operative portion of §6(*l*)(6), in a form virtually identical to that found in the 1998 Anti-Drug Abuse Act. The Senate Report contained the following paragraph, cited by the majority as indicative of congressional intent that innocent tenant evictions were not intended by Congress:

> The Committee anticipates that each case will be judged on its individual merits and will require the wise exercise of humane judgment by the PHA and the eviction court. For example, eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity. Id. 1123

Despite the fact that the report language mentions only guests, and not household members, the majority broadly concluded:

> In these Reports, Congress specifically rejects the notion that the PHAs' discretion is so broad that it extends to the eviction of innocent tenants.... §1437d(*l*)(6) must be read in conjunction with the good cause requirement of §1437d(*l*)(5). Accordingly, we reject HUD's interpretation as contrary to the clearly

expressed intent of Congress. *Chevron* 467 U.S. at 842-43, 104 S.Ct. 2778. Id. 1123

The court also relied upon several additional principles of statutory construction: Statutory language should be interpreted by considering its place in the overall statutory scheme, and statutes should, where possible, be construed in a manner that will harmonize them;[3] statutes should not be interpreted to produce odd or absurd results;[4] and finally statutes should, wherever possible be construed in a manner that will avoid serious doubts about their constitutionality.[5]

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3 In addition to the grounds for termination of public housing tenancy stated in §6(l)(6), §6(l)(5) also permits termination of tenancy for serious or repeated violations of the lease or "other good cause." In the name of interpreting the provisions in context, the court interpreted the "good cause" requirement as limiting terminations under §6(l)(6) for criminal activity. In fact, these provisions are separate and cumulative of one another. The majority also said that HUD's construction of paragraph 6(l)(6) would allow "irrational evictions, and thus would require PHAs to include an unreasonable term in their lease [in violation of §6(l)(1) prohibiting unreasonable lease terms] of and permit eviction without good cause." 237 F.3d. 1113, 1121

4 The majority hypothesized that, because it authorizes eviction for drug-related criminal activity occurring off the public housing premises, the statutory language, when taken to the extreme, would allow eviction of a family for drug crime committed by a family member 3,000 miles away without the knowledge of the other members of the household. The majority concluded that this "odd and absurd" result could not have been intended by Congress and the statute should be interpreted so as to avoid it. This hypothetical did not, of course, represent the matter before the court, where the drug crime occurred in the unit (one instance), on the premises of the development (two instances), and three blocks away (one instance).

5 The court hinted, but did not hold, that innocent tenant evictions might violate constitutional due process requirements. To avoid this perceived constitutional problem, the court adopted the tenants' suggestion that the term "control" in the statutory language be construed "as a limitation on the

All of these considerations led the court to conclude that "...Congress did not intend §1437d(*l*)(6) to permit the eviction of innocent tenants. Thus, HUD's contrary interpretation must be rejected...." Id. 1127

The four-judge dissent expressed virtually no common ground with the majority, save perhaps in its acknowledgment of the extreme seriousness of drug and crime problems in public housing and in its agreement that the principles of Chevron U.S.A., Inc. v Natural Resources Defense Counsel, 467 U.S. 837 (1984) ought to govern. The dissent points out that, under Chevron, a court may not substitute its interpretation for that of a federal agency charged with implementing a statute where the agency's interpretation is a "permissible" construction of the statute.[6] 237 F.3d 1113, 1128

In addition to observing that the plain language of the statute authorizes "ignorant" tenant evictions, the dissent points to other Housing Act language (42 U.S.C.

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breadth of the provision." 237 F.3d 1113, 1126 In this way, the majority found its way to requiring that the PHA must prove the tenant could realistically have exercised control not only of "another person under the tenant's control" who engages in criminal activity but also of household members and guests who do so. An ordinary textual analysis does not suggest this interpretation.

6 In order for a court to disregard HUD's regulations, therefore, Chevron requires a finding of congressional intent on the precise question at issue that is sufficiently unequivocal as to render HUD's contrary construction of the statute impermissible. The majority's assertion that congressional intent is unequivocal is weakened as it regards evictions based on the misconduct of household members (three of the four plaintiffs in this case) where the legislative history relied upon (Senate Report No. 101-316) mentions only guests and says nothing about evictions based on crime by household members. Moreover, as the dissent points out, a full consideration of statutory context reveals that the Housing Act elsewhere vests in PHAs maximum authority and flexibility in carrying out the housing programs, and the Senate Report itself acknowledges that the Housing Act grants PHAs discretion to determine when evictions are appropriate.

§1437d(c)(4)(A)(iii)) that makes sense only if ignorant tenant evictions were permitted and draws a conclusion directly contrary to that of the majority with respect to the inclusion of an innocent tenant defense in the federal statutes providing for civil forfeiture.[7] The dissent further notes that Congress did not elect to amend §1437d(*l*)(6) in 1996 when it amended this section to extend the authorization to evict from public housing to off-premises drug crime, notwithstanding that it was well-aware of the position of advocacy grounds that innocent tenant evictions ought not to be permitted.[8] It cited, in this regard, the Ninth Circuit's own precedent in United States v. Hunter, 101 F. 3d 82 (9th Cir. 1996): "As a matter of statutory construction, we 'presume' that congress is knowledgeable about existing law pertinent to the legislation it enacts.'". Id. 85

The dissenting opinion also directly refutes the majority's conclusions; 1) that evictions of innocent tenants are "unreasonable" or "absurd" and 2) that construing §6(*l*)(6) to permit such evictions violated the statutory prohibition in §6(*l*)(1) of unreasonable lease terms. While agreeing that the district court had properly defined a reasonable lease term, the

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7 The majority suggested that the enactment of statutory innocent owner defense in another section of the 1988 Anti-Drug Abuse Act (21 U.S.C. § 881(a)), which provides for forfeitures of real property interests including leaseholds, indicated a Congressional intent to provide an innocent tenant defense in §6(l)(6). 237 F.3d 1113, 1121-22 The lack of such language in §6(l)(6) actually argues the contrary, since, as the dissent pointed out, Congress was capable of including such a defense in §6(l) if it had so desired or intended. See Russello v. United States, 464 U.S. 16 (1983).

8 Congress has further amended Section 6 of the Housing Act and enacted other free-standing provisions relating to screening and evictions from public housing in Subtitle F of the Quality Housing and Work Responsibility Act of 1998 (Pub. L. 105-276, approved October 21, 1998). These amendments, and the fact that they enunciate clear present congressional intent to exclude entire households based on the conduct of individual household members are discussed infra.

dissent disagreed that regulations and lease provisions permitting innocent tenant evictions were unreasonable in the context of the twin congressional objectives of addressing increasing drugs-related crime in public housing and of enabling PHAs to possess a credible deterrent against criminal activity so that tenants would cooperate with PHAs in solving these problems. These objectives, coupled with the fact that such provisions are in regular use among private parties to leases of residential property, attested to the fact that "the congressional imposition of liability without fault on individuals is not per se unreasonable." 237 F.3d 1113, 1137

Finally, the dissent disputed the use by the majority of the doctrine of "constitutional doubt." The majority had expressed doubt about whether innocent tenant evictions might violate due process. In order to assure the statute's constitutionality, the majority construed the word "control" in the statute as a limitation on all evictions for third-party crime. The dissent replied that this misapplied the doctrine of constitutional doubt. Quoting Almendarez-Torres v. United States, 523 U.S. 224 (1998), the dissent pointed out that "[t]he 'constitutional doubt' doctrine does not apply mechanically whenever there arises a significant constitutional question the answer to which is not obvious." Id. 239 The doctrine is properly applied only where the statute is genuinely susceptible of two constructions and there is a serious likelihood that the statute will be held unconstitutional.[9] A discussion follows in which the dissent notes that housing is not a constitutional or other entitlement and that the rights arising under the Housing Act do not stem from constitutional necessity but rather congressional notions of sound policy. "In this case, Congress has limited the right to reside in public

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9 237 F.3d 1113, 1138 It may be noted that, if the statute is genuinely susceptible of more than one interpretation, majority was bound under Chevron to defer to HUD's interpretation.

housing to those individuals who agree to accept responsibility for the drug-related criminal activity of their household members and guests." 237 F.3d 1113, 1138 The dissent concluded that no genuine due process issue exists.

The sharp divisions of opinion seen in the respective opinions of the majority and the dissent in this case, reflect the views of other courts that have decided the "innocent/ignorant tenant" issue:

Subsequent to publication of the opinion by the three-judge panel in Rucker, but before publication of the court's *en banc* opinion, the United States District Court, Middle District of Florida, rejected a challenge on constitutional and other grounds to the eviction of several "innocent tenants" in Burton v. Tampa Housing Authority, Case. No. 8:99-cv-1238-T-26E (Unreported). In granting the housing authority's motion for summary judgment, the district court followed the reasoning of the three-judge panel in Rucker and an earlier opinion of the Fifth Circuit Court of Appeals upholding a policy of the El Paso Housing Authority that held tenants responsible for the on-premises criminal activity of guests. Chavez v. Housing Authority of the City of El Paso, 973 F.2d 1245 (5th Cir. 1992). This ruling is presently under review by the Eleventh Circuit Court of Appeals.

The Supreme Courts of Minnesota and Tennessee have considered the innocent tenant issues, reaching contradictory results. Compare Minneapolis Public Housing Authority v. Lor, 591 N..W.2d 700 (Minn. 1999) (upholding eviction of entire family for drive-by shooting on public housing premises in which tenant's son participated, recognizing no requirement for proof of the tenants knowledge or participation, and limiting the scope of judicial review to determination of lease violation) with Memphis Housing Authority v. Thompson, 38 S.W.3d 504 (Tenn. 2001) (disallowing eviction of tenant for drug possession of guest occurring in her public housing unit, finding the lease provision based on federal statute and regulations to be ambiguous and construing it against the

drafter). A petition to this Court for a writ of certiorari seeking review of this decision (Docket No. 00-1861) has been filed by the Memphis Housing Authority.

Predictably, state intermediate appellate courts are in confusion regarding the law applicable to "innocent tenant" evictions. A number of such courts have upheld terminations of tenancy in such cases under various factual circumstances.[10]

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10 E.g., Housing Authority of New Orleans v. Green, 657 So.2d 552 (La. App. 4th Cir. 1995), app. denied, 661 So.2d 1355 (La. 1995), cert. denied, 517 U.S. 1169 (1996) (allowed eviction of tenant for drug-related criminal activity of son based on tenant's contractual obligation under the lease to assure that such activity did not occur); Minneapolis Public Housing Authority v. Holloway, CO-95-391, 1995 Minn. App. LEXIS 1028 (Minn. Ct. App. Aug. 15, 1995) (permitted eviction of tenant for criminal activity by persons allowed in her unit, rejecting argument that eviction was improper where the tenant could not have foreseen the activity or controlled the events leading to the termination of her tenancy); South San Francisco Housing Authority v. Guillory, 41 Cal. App. 4th Supp. 13, 49 Cal. Rptr. 2d 367 (1995) (eviction of entire family for son's drug possession allowed despite lack of parents' knowledge, where lease contractually obligated tenant to assure that drug crime not occur in the unit); Allegheny County Housing Authority v. Liddell, 722 A.2d 750 (Pa. Commw. Ct. 1998) (PHA did not abuse its discretion in evicting innocent/ignorant tenant for drug-related crime of guest outside the unit, and lower court, in refusing to evict, improperly substituted its discretion for that of the PHA); Syracuse Housing Authority. v. Boule, 172 Misc.2d 254, 658 N.Y.S.2d 776, 780 (Syracuse City Ct. 1996), aff'd, 177 Misc.2d 400, 676 N.Y.S.2d 741 (Onondaga County Ct. 1998), rev'd, 265 A.D.2d 832, 701 N.Y.S.2d 541 (N.Y.App.Div. 4th Dep't 1999) (eviction of tenant permitted where tenant's babysitter and others had engaged in drug-related criminal activity in tenant's unit while she was at work and presumably unaware of the activity); Memphis Housing Authority v. Thompson, 1999 Tenn. App. LEXIS 506 (Tenn. Ct. of App. July 29, 1999) (allowed eviction for drug possession of guest where tenant had no prior knowledge of the criminal activity, ruling that tenant violated lease when she allowed the perpetrator into her unit and subsequently failed to assure that he did not engage in criminal activity there) rev'd 2001 Tenn. LEXIS 106 (Tenn. Feb. 20, 2001); Willock v. Schenectady Municipal Housing Authority, 706 N.Y.S.2d 503 (N.Y. App. Div. 2000) (where neither the statute nor HUD's regulation sets forth a requirement for knowledge by the tenant, eviction of tenant for drug possession of a guest was proper); Ann Arbor Housing Commission v.

Others have reached contrary results.[11]

Faced with conflicting judicial precedents, local housing agencies are uncertain of the enforceability of federal policy articulated by the Department of Housing and Urban Development authorizing the eviction of so-called innocent tenants. This circumstance increasingly emboldens tenants to refuse to cooperate in the removal and bar of offending

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Wells, 618 N.W.2d 43 (Mich. Ct. App. 2000) (eviction of tenant for drug-related crime of brother was proper regardless of whether tenant had knowledge of the illegal activity) See also, Housing Authority & Urban Redevelopment Agency of Atlantic City v. Spratley, 327 N.J. Super. 246, 743 A.2d 309 (N.J. Super. App. Div. 1999) (federal law preempted New Jersey's anti-eviction law and federally mandated lease provisions holding tenant accountable for acts of household members or guests are not unreasonable and must be enforced); Barajas v. Housing Authority of Harlingen, 882 S.W.2d 853 (Tex. App. Corpus Christi 1994) (where household member sold drugs outside the unit, eviction of co-tenant was within the discretion of the housing authority).

11 E.g., Housing Authority of Charlotte v. Patterson, 464 S.E.2d 68 (N.C. App. 1995) (refusing to evict tenant for her son's homicide of neighbor where unless personal fault of tenant could be shown, resorting to Committee Report to ascertain Congressional intent after finding § 6(l)(5) of the Housing Act to be ambiguous); Vargas v. Franco, 656 N.Y.S.2d 628 (N.Y. App. Div. 1997) (refusing to evict tenant for repeated acts of graffiti outside the unit by tenant's son because eviction penalty deemed too harsh); Housing Authority of the City of Hoboken v. Alicea, 297 N.J Super. 310 (N.J. Super. Ct. App. Div. 1997) (PHA could evict tenant for drug possession of son in unit only if it could show that the tenant both permitted the offender to stay in the apartment and knew of his illegal activities); Dolson v. Middletown Housing Authority, 672 N.Y.S.2d 665 (N.Y. Sup. Ct. 1998) (tenant was not vicariously liable for conduct of her son) Minneapolis Public Housing Authority v. Lor, 578 N.W.2d 8 (Minn. Ct. App. 1998) (refusing to evict for son's participation in drive-by shooting on equitable grounds where tenant was out of town at the time and did not know of or participate in the criminal act) rev'd 591 N.W.2d 700 (Minn. 1999); Delaware County Housing Authority v. Bishop, 749 A.2d 997 (Pa. Commw. Ct. 2001), cert. denied 121 S.Ct 1644 (2001); Housing Authority of Pittsburgh v. Fields, 2001 Pa.. Commw. LEXIS 182, March 28, 2001).

household members or guests, a course of action that represents the only practicable alternative to evicting the entire household. A decision of this Court upholding the policy of the Department of Housing and Urban Development regarding this issue is important and necessary to the control of crime in public housing developments nationwide.

II. THE INCIDENCE OF CRIME AND ILLEGAL DRUGS IN PUBLIC HOUSING IS A MATTER OF GREAT CONCERN TO THE FEDERAL GOVERNMENT. THIS CONCERN IS DIRECTLY REFLECTED IN FEDERAL POLICIES AUTHORIZING THE REMOVAL FROM PUBLIC HOUSING OF FAMILIES WHOSE MEMBERS ENGAGE IN DRUG-RELATED OR OTHER SERIOUS CRIMINAL ACTIVITY.

The seriousness of drug and crime problems in public housing was acknowledged in both the majority and dissenting opinions of the court below. They reflect the awareness Congress had, in 1988, when those problems were perceived as so serious to warrant passage of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4295, 42 U.S.C. §11901 *et seq.* Since 1988, according to HUD News Release 99-233 and Agency Budget Summaries available from the Office of National Drug Control Policy, Congress has funded and HUD awarded more than $2 billion in grants under the Public and Indian Housing Drug Elimination Program authorized in the Anti-Drug Abuse Act. These grants have been earmarked for activities aimed at achieving a reduction of drug use and other crime in public and assisted housing.

Since 1991, strict federal policies concerning public housing evictions for drug-related and other criminal activity by members of public housing households and their guests have been reflected in HUD's regulations, as promulgated in final rule, published October 11, 1991, entitled "Public Housing Lease and Grievance." 56 FR 51560 *et seq.* Housing Act

paragraph 6(*l*)(6), as enacted in the Cranston-Gonzalez National Affordable Housing Act of 1990 is implemented by regulations at 24 CFR §§ 966.4((f)(12) and 966.4(*l*)(2)(ii). These regulatory provisions closely track the statute and require public housing leases to contain provisions that obligate the tenant contractually to assure that neither the tenant nor any household member, guest or other person under the tenant's control commit crimes. (Appendix, 1a-5a). These policies are confirmed in HUD regulations published May 24, 2001 implementing Subtitle F of the Quality Housing and Work Responsibility Act (Pub. L. 105-276, approved October 21, 1998) and other statutory enactments. 66 FR 28776 *et seq.*

III. THE STATUTE AND REGULATIONS ARE UNAMBIGUOUS. THEY PROVIDE CLEAR AUTHORITY FOR TERMINATION OF TENANCY IRRESPECTIVE OF THE TENANT'S KNOWLEDGE OF, OR PARTICIPATION IN THE CRIMINAL ACTIVITIES OF OTHER HOUSEHOLD MEMBERS OR GUESTS. RESORT TO LEGISLATIVE HISTORY WAS THUS UNNECESSARY AND IMPROPER.

That the drug-related criminal activity in this case constitutes a sufficient basis for eviction, absent questions of the personal involvement or fault of the tenant heads-of-household, is not in dispute. However, the Ninth Circuit found the statute and regulation to be ambiguous as it regards the eviction of so-called innocent tenants.

Amici Curiae urge that the statutory language is not ambiguous. It plainly says that PHAs are required to utilize public housing leases providing that it shall be cause for termination of tenancy if either (1) the tenant, or (2) any household member, (3) or any guest or (4) any other person under the tenant's control, engages in certain types of criminal behavior. The language contains no mention of a requirement of personal fault on the part of the head of household, or of knowledge, or of control over a household member. An

ordinary reading of the statutory text will indicate that the word "control" refers to "another person," not to a household member or guest.

The Ninth Circuit majority asserts that the language of the statute is ambiguous, not because of what it says, but rather because of what it does not say. Applying such a standard subjects virtually any text that does not elaborate what it does not mean, or what it does not say, to a charge of ambiguity. This Court has stated that where the statutory command is straightforward, there is no reason to resort to legislative history. "Where there is no ambiguity in the words, there is no room for construction." United States v. Gonzales, 117 S.Ct. 1032, 1036 (1997). Only an "absurd or glaringly unjust result" ..."would warrant departure from the plain language of the statute." Inter-Modal Rail Employees Ass'n v. Atchison T&SF Ry. Co., 117 S.Ct 1513, 1516 (1997). "We have repeatedly recognized that "[when]...the terms of a statute [are] unambiguous, judicial inquiry is complete, except in "rare and exceptional circumstances....In the absence of a clearly expressed legislative intention to the contrary, the language of the statute itself must ordinarily be regarded as conclusive." United States v. James, 478 U.S. 597, 606 (1986) (internal quotations and citations omitted). By these standards, and seen in the larger context of federal housing policy, Housing Act § 6(*l*)(6) should be given its plain meaning.

IV. IF, *ARGUENDO*, THE COURT BELOW PROPERLY RESORTED TO LEGISLATIVE HISTORY CREATED SUBSEQUENT TO THE ORIGINAL ENACTMENT OF THE LANGUAGE IN QUESTION, IT ERRED IN FAILING TO CONSIDER ALL RELEVANT LEGISLATION SUBSEQUENTLY ENACTED BY CONGRESS.

As noted, the statutory language at issue in this case was first enacted, substantively, in the 1988 Anti-Drug Abuse Act. It was reenacted without substantive change in the 1990

Cranston-Gonzalez National Affordable Housing Act. The report language relied upon by the court below as instructive of congressional intent relates to the 1990 re-enactment of this language.

To the extent that resort to non-contemporaneous materials extrinsic to the statutory language is considered appropriate, *amici curiae* urge that all subsequently enacted legislation relating to control of crime in public housing should be considered. Since 1990, Congress has legislated at least four times with respect to control of illegal drugs and crime in public housing. Its most direct expression of Congressional intent to authorize the exclusion and removal of entire households from public housing because of the criminal activity of individual members of the household is found in the provisions of Subtitle F of the Quality Housing and Work Responsibility Act of 1998, §§ 575-579:[12] (emphasis added)

> § 576(b) requires PHAs to establish standards that prohibit admission to public housing] for "any household with a member" who the PHA determines is illegally using a controlled substance or with respect to whom the PHA has reasonable cause to believe that "such household member" has a pattern of abuse of drugs or alcohol that may interfere with the health,

[12] Also, §9(a)(2) of the Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, substituted the word "off" for the word "near" in this paragraph, thus permitting termination of public housing tenancy for drug-related criminal activity occurring off the premises of public housing developments. See also Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, § 903, authorizing termination of tenancy of public housing tenants fleeing to avoid prosecution for a felony or violating probation or parole; VA, HUD and Independent Agencies Appropriations Act, 1999, Pub. L. No. 105-276, § 428, barring public and assisted housing occupancy by persons convicted of manufacturing methamphetamine in a public housing unit.

> safety or peaceful enjoyment of the premises by other residents.
>
> § 576(c) provides that if a PHA determines "that an applicant or any member of the applicants's household" is or was during a reasonable period preceding the application engaged in [criminal activity], the PHA may deny "such applicant" [*i.e.*, household] admission to the program or the federally assisted housing.
>
> § 577(a) provides: "...a public housing agency...shall establish standards or lease provisions for continued assistance or occupancy...that allow the agency...to terminate the tenancy or assistance for any household with a member - [who is illegally using drugs or whose abuse of drugs or alcohol may constitute a threat to other residents]."

In the face of this legislation, enacted during the pendency of HUD's "One-Strike and You're Out" Initiative, it is impossible to conclude that present federal policy prohibits the eviction of the "innocent tenant."

V. IMPOSING RESPONSIBILITY ON THE HEAD OF HOUSEHOLD TO ENSURE THAT THE CONDUCT OF HOUSEHOLD MEMBERS CONFORMS TO THE REQUIREMENTS OF THE PUBLIC HOUSING LEASE IS ESSENTIAL TO THE SUCCESSFUL ADMINISTRATION OF THE FEDERAL PUBLIC HOUSING PROGRAM AND IS NOT UNREASONABLE.

Imposing upon public housing agencies a requirement that they prove knowledge on the part of tenants concerning the activities of other household members is impractical. As pointed out in HUD's preamble to the 1991 Lease and Grievance rule, in practice it may be extremely difficult or

impossible for a public housing agency to show that the tenant knew or could have foreseen a criminal act or failed to take all reasonable measures to prevent it. 56 FR 51567, App. 4a Agencies may have no capability to rebut self-serving testimony on the part of household members, whatever the truth may be. Public housing agencies (and other residents) should not be required by the courts to await victimization by a reoccurrence of criminal behavior before being able to evict. As both HUD and local officials have observed, the only practicable policy for deterring criminal misconduct of members of public housing households must be to hold the only persons in a position to know all the facts responsible for the household's behavior.

VI. THE COURT BELOW ERRED IN FAILING TO DEFER TO THE DEFINITIVE INTERPRETATION OF THE STATUTORY LANGUAGE BY THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD).

The meaning ascribed by the lower court to Housing Act paragraph 6(*l*)(6) directly contradicts conclusions reached concerning this language by HUD. The preamble to HUD's 1991 Lease and Grievance final rule, promulgating the applicable regulations, makes it clear that, with respect to the responsibility of the head of household for the conduct of other members of the household, HUD regards the statutory language as authorizing a direct contractual obligation. The tenant's liability is not vicarious. Section 3.3 of the rule preamble makes clear that the head of household has an affirmative obligation to ensure that members of the household do not engage in prohibited criminal behaviors. (App. 1a-4a). The preamble addressed public comments urging that the rule be changed so that eviction of a public housing tenant for misconduct on the part of other household members be predicated on actual knowledge or ability to control. HUD rejected these suggestions. 56 FR 51566

This Court has repeatedly held that, where an agency charged with enforcing a statute has rendered an interpretation that is a permissible construction of the statute, a court may not substitute its own interpretation for that of the agency. Chevron, supra.

VII. THE COURT BELOW USURPED THE DISCRETION PROPERLY RESIDING WITH THE HOUSING AUTHORITY UNDER APPLICABLE FEDERAL LAW.

The applicable provision of the U.S. Housing Act and HUD's regulations do not require a PHA to evict. They state only that public housing leases must provide that certain behaviors on the part of a tenant, any member of tenant's household, a guest or other person under the tenant's control *shall be cause for* eviction. Assuming that a lease violation is established, whether or not action will be taken to terminate tenancy and subsequently to evict rests within the discretion of the PHA. HUD's Public Housing Lease and Grievance regulations at 24 CFR § 966.4(*l*)(5) explicitly recognize this.

The discretion to which these regulations refer resides with the PHA not the reviewing court. See Minneapolis Public Housing Authority v. Lor, 591 N.W.2d 700 (Minn. 1999) The discretionary decision of the PHA should thus not be disturbed unless arbitrary, capricious, unsupported by substantial evidence, or abusive to such an extent as to amount to an error of law. Clark v. Alexander, 85 F.3d 146 (4th Cir. 1996)

The holding of the majority in the court below and those of other courts refusing to evict the so-called "innocent tenant" seem implicitly based in conceptions of equity and the avoidance of hardship to the tenant. Judicial focus in such cases only upon the perceived hardship to individual defendants represents an incomplete conception of equity, because it ignores the disastrous effect that drug-related and serious violent criminal behavior has upon other public housing residents.

Excessive focus on avoiding hardship to the defendants in these cases also ignores the reality that the retention of a family in public housing whose members commit crimes has the likely effect of excluding an equally needy family on the waiting list whose members are not criminals. As the dissent in the court below acknowledged, unlike federal benefit programs such as Food Stamps, federal housing benefits have never been an "entitlement" under which all income-eligible persons have a right to housing assistance. To the contrary, it has been estimated that, nationwide, the assistance available under the federal housing programs is sufficient to serve only *25 percent* of the persons who are actually eligible for such assistance.[13] The scarce resource that is public housing ought to be reserved for families whose members do not engage in drug crimes or prey upon their neighbors. Ultimately, someone must be responsible for the criminal behavior of household members. That someone must be the person responsible for introducing those engaging in the criminal misconduct to the public housing community.

CONCLUSION

For the foregoing reasons, *amici curiae* HDLI and NAHRO respectfully urge the Court to issue a writ of certiorari to the United States Ninth Circuit Court of Appeals in this cause.

Respectfully submitted,

June 22, 2001

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[13] Kingsley, *Federal Housing Assistance and Welfare Reform: Uncharted Territory*, The Urban Institute, New Federalism - Issues and Options for States, Series A, No. A-19 (Dec. 1997)

APPENDIX

APPENDIX

Excerpt, HUD 1991 Public Housing Lease and Grievance Rule Preamble (56 FR 51566-67)

3.3 *Eviction For Criminal Activity*

3.3.1 Crime By Household Member

Federal law provides that certain categories of criminal activity by a public housing household member are grounds for eviction. A PHA must: "utilize leases which-... provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or near such premises, *engaged in by ... any member of the tenant's household ...* shall be cause for termination of tenancy ..." (U.S.H. Act, sec. 6(1)(5). 42 U.S.C. 1437d(1)(5)) {emphasis supplied}.

The U.S.H. Act statutory prohibition of criminal activity by a public housing household member was originally enacted in the Anti-Drug Abuse Act of 1988 (section 5101. Pub. L. 100-690. November 18, 1988), and was retained in the 1990 NAHA amendments which redefined the classes of criminal activity to which this prohibition applies (Pub. L. 101-625, section 504, amending section 6(1)(5) of the U.S.H. Act). The proposed and final rule provide that the tenant must assure that members of the household (or guests, or other persons under the tenant's control) do not engage in proscribed criminal activity (§ 968.4(f)(12)(i)).

Comment by legal aid and by tenant organizations asserts that the tenant should not be required to "assure" the non-criminal conduct of household members, or should have only a limited responsibility to prevent criminal behavior by

members of the household. Comment proposes various possible standards to determine whether the tenant can be evicted for criminal behavior by household members. Comment alleges that the tenant should not be responsible if the criminal activity is beyond the tenant's control, if the tenant did not know or have reason to foresee the criminal conduct, if the tenant did not participate, give consent or approve the criminal activity, or if the tenant has done everything "reasonable" to control the criminal activity. Comment states that under the Constitution a tenant can only be held responsible for activity of a household member within the tenant's control.

PHA comment states that the PHA must be given discretion to evict an entire family for actions of a family member if eviction is in the best interest of other residents. If a PHA lacks clear authority to evict, the PHA may not be able to convince the family to oust a person who engages in criminal activity from the unit.

As in conventional tenancy, a public housing tenant holds tenure of the unit subject to the requirements of the lease, including obligations concerning the conduct of household members affecting the unit, the management of the housing or the welfare of other residents. By signing the lease, a tenant agrees to comply with leasehold requirements pertaining to the behavior of family members. The ability of a PHA or other landlord to enforce covenants relating to acts of unit residents (e.g., damage to a unit, disturbance of other residents) is a normal and ordinary incident of tenancy, and is important for management of the housing. The power of a landlord to evict for the tenant's breach of lease requirements concerning behavior of any member of the household gives the tenant and other occupants a strong motive to avoid behavior which can lead to eviction. If the tenant does not control criminal, or other harmful or disruptive behavior, by

unit occupants, the landlord can evict - removing the occupants from the housing. If the landlord does not or cannot evict for such behavior, the continued presence of the tenant and household may result in harm to the housing or other residents, and the spread of such behavior.

The Congress has determined that drug crime and criminal threats by public housing household members are a special danger to the security and general benefit of public housing residents, warranting special mention in the law. (U.S.H. Act section 6(1)(5). 42 U.S.C. 1437d(1)(5).) For this reason, the Congress specified that these types of criminal activity by household members are grounds for termination of tenancy (without the need for a separate inquiry as to whether such criminal activity constitutes serious or repeated lease violation or other good cause for eviction). The legislative determination by the Congress rests on a reasonable judgement that the potential for a PHA to exercise eviction as a contractual sanction against criminal behavior by unit occupants will promote the welfare of public housing residents in general, and will support the effective management of the housing. Since this judgement is reasonable, and promotes a legitimate public purpose, the legislation is Constitutional under the normal equal protection standard.

There is no reason of Constitutional necessity or public policy for HUD to impose - as proposed by comment - any additional restriction on when the tenancy may be terminated for criminal activity by a household member.

First, as we have already remarked, contractual responsibility of the tenant for acts of unit occupants is a conventional incident of tenant responsibility under normal landlord-tenant law and practice, and is a valuable tool for management of the housing. The tenant should not be

excused from contractual responsibility by arguing that tenant did not know, could not foresee, or could not control behavior by other occupants of the unit.

Second, if household member criminal activity is ground for termination, then the tenant has reason to try to control or prevent the activity to protect the tenant's right to continued occupancy by the family. The standards proposed by some of the public comment would allow a variety of excuses for a tenant's failure to prevent criminal activity by household members. The proposed changes would thereby undercut the tenant's motivation to prevent criminal activity by household members.

Third, in practice it will be extremely difficult for the PHA to show that the tenant knew, could have foreseen, could have prevented, or failed to take all reasonable measures to prevent, crime by a household member. In practice, the tenant may have encouraged or profited from the criminal activity or may have ignored or turned a blind eye. The statute and regulations are based on a different, simpler and more practical test, whether a household member has in fact committed the criminal activity. In terminating tenancy for this reason, the PHA enforces the tenant's contractual duty, expressed in the lease, to prevent such activity by any family member. (If a tenant cannot control criminal activity by a household member, the tenant can request that the PHA remove the person from the lease as an authorized unit occupant, and may seek to bar access by that person to the unit.)

Finally, a family which does not or cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project.

24 CFR §§ 966.4((f)(12) and 966.4(*l*)(2)(ii)

(f) The Lease shall provide that the tenant shall be obligated...
(12)(i) To assure that the tenant, any member of the household, a guest, or another person under the tenant's control, shall not engage in:
(A) Any criminal activity that threatens the health, safety or right of peaceful enjoyment of the PHAs public housing premises by other residents or employees of the PHA, or (B) any drug-related criminal activity on or near such premises.

Any criminal activity in violation of the preceding sentence shall be cause for termination of tenancy, and for eviction from the unit.

(2) *Grounds for termination...*
(ii) Either of the following types of criminal activity by the tenant, any member of the tenant's household, a guest, or another person under the tenant's control, shall be cause for termination of tenancy:
(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the PHA's public housing premises by other residents...."
(B) [Drug-related criminal activity]"

24 CFR § 966.4(*l*)(5)

Eviction for criminal activity - (i) PHA discretion to consider circumstances. In deciding whether to evict for criminal activity, the PHA shall have discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity. In appropriate cases, the PHA may permit continued occupancy by remaining family members and may impose a condition that family members who engaged in the proscribed activity will not reside in the unit...."